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Common Maritime Transport Policy for the EEC: The Commission Does Battle With Flags of Convenience

I. INTRODUCTION

On May 31, 1989, the Commission of the European Community (Commission) sent to the Council of Ministers (Council) a Communication entitled "A Future for the Community Shipping Industry: Measures to Improve the Operating Conditions of Community Shipping" (Communication).¹ The Communication calls for the Council to adopt an action programme that is designed to establish a common maritime transport policy for the European Economic Community (EEC or Community).²

¹ Communication by the Commission to the Council, A Future for the Community Shipping Industry: Measures to Improve the Operating Conditions of Community Shipping, COM(89) 266 [hereinafter Communication].

In December of 1986, the Council of Ministers (Council) adopted a package of four regulations which focused on the threat to the Community shipping industry from protectionist policies and practices of third countries. Communication, *supra*, at I(2). Included in the adoption of the four regulations was a "statement" from the Council relating to the further development of Community shipping policy. *Id.*

Consistent with the Council's "statement," the Commission has sent the Communication. *Id.* The Communication is a non-binding document recommending certain actions, which will be debated by the Council. The Council will discuss the Communication, probably suggest amendments, and adopt an action programme for the Commission. Interview with Philippe Sands, Director of the Centre for International Environmental Law, King's College London, London University, and Visiting Professor, Boston College Law School. This action programme would set out the basis for future Commission proposals for regulations and directives designed to establish a common maritime transport policy. *Id.* The proposed regulations and directives would then be debated by the Parliament and may require unanimous consent of the Council in order to be enacted. See CLIFFORD CHANCE, 1992: AN INTRODUCTORY GUIDE 86 (1988); Treaty Establishing The European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, art. 84 [hereinafter EEC Treaty]. Enactment of any proposed regulation or directive concerning sea transport enacted under article 84 requires a unanimous vote of the Council. EEC Treaty, *supra*, at art. 84.

² See Communication, *supra* note 1, at I(1)–(8). Although establishing a common maritime transport policy is not a major priority of the EEC Treaty, the treaty does authorize the creation of such a policy. Bredimas, *The Common Shipping Policy of the EEC*, 18 COMMON MKT. L. REV. 9 (1981). Title IV of the EEC Treaty applies to transport. *Id.* Article 74 of title IV calls for member states to pursue a common transport policy consistent with the objectives of the EEC Treaty. EEC Treaty, *supra* note 1, at art. 74. Article 84 of title IV gives the Council of the European Community (Council), acting unanimously, the power to establish provisions for sea transport. *Id.* at 84. In this way, the Council has the authority to pass specific acts dealing with maritime transport. *Id.*

The common maritime transport policy would have two goals.³ The primary goal would be to halt the decline in the EEC merchant marine fleet (Community fleet) and, thus, avoid a crisis in the EEC maritime transport industry.⁴ The second goal would be to help complete the internal market of the EEC.⁵ The Communication details these goals, and it proposes for the Council's consideration a package of draft regulations that would form the foundation of the action programme.⁶

The Commission asserts that the EEC needs a common maritime transport policy for several reasons.⁷ The Commission suggests that such a policy would protect the strategically important Community fleet.⁸ In addition, the Commission claims that a common maritime transport policy is necessary to protect labor in the shipping industry as well as in related services and industries.⁹ The Commission further advocates adoption of the proposed action programme as a means of decreasing divisiveness among member states.¹⁰

Specifically, the Communication calls for a three-tiered action programme¹¹ that includes the creation of a Community shipping

³ Communication, *supra* note 1, at I(2), I(4).

⁴ *Id.* at I(2), I(4), III(2)(48); *see also infra* text accompanying notes 16–51. Essentially, the Communication attempts to discourage European shipping operations from registering their vessels under flags of convenience and offshore shipping registers. Communication, *supra* note 1, at I(2). Faced with intense international competition, European shipping operations have been registering their vessels under flags of convenience and offshore registers in order to decrease operating costs. *Id.* at II(1)(b)(19). This trend has caused a dramatic decline in the size of the Community fleet and has created a divisive situation between member states. *Id.* at I(1). Since 1980, the Community fleet has suffered both in terms of absolute tonnage and in its share of the world fleet. *Id.*

The Communication proposes substantial measures designed to halt the decline in the Community fleet and to address the erosion of the competitive advantage of the Community fleet in the world market. *Id.* at I(2). The Commission calls for a united Community effort, consistent with the goals of the EEC Treaty, in order to deal effectively with the situation. *Id.*

⁵ *Id.* at I(4).

⁶ *Id.* at I(3)–(8).

⁷ *Id.* at III(1)(42); *see infra* text accompanying notes 16–51.

⁸ Communication, *supra* note 1, at III(1)(42).

⁹ *Id.* at III(1)(44),(45).

¹⁰ *Id.* at III(2)(49).

¹¹ *Id.* at III(2)(54); *see* New Developments, *Commission Adopts Plan for Community Shipping Register*, Common Mkt. Rep. (CCH) ¶ 95,173 (1989) [hereinafter New Developments]; *see infra* text accompanying notes 65–105.

register,¹² code named "EUROS;"¹³ the harmonization of member state assistance to the Community fleet;¹⁴ and the implementation of certain incentives to attract European shipowners to register under the flag of the European Communities (EC flag).¹⁵

This Comment discusses the Communication in light of the crisis situation facing the Community fleet. Part II discusses the background of this crisis. Part III presents the advantages of a common maritime transport policy for the EEC. Part IV discusses the specific details of the proposed action programme. Part V analyzes the proposed action programme in terms of its probable success in addressing the shipping crisis and completing the internal market. Finally, this Comment concludes that the proposed action programme probably would not solve the problems caused by flags of convenience, but that it probably would successfully contribute to the completion of the internal market.

¹² Communication, *supra* note 1, at III(2)(54). The Community shipping register would operate parallel to the member states' registers and would entitle qualified ships to fly the EC flag. *Id.* at IV(55). Ships registered under the EC flag would be granted certain benefits such as cabotage rights. *Id.* at VI(7)(141).

Under customary principles of international law, all ships must be registered in a sovereign nation in order to be protected on the high seas. Convention on the High Seas, April 29, 1958, art. 5, 13 U.S.T. 2312, 450 U.N.T.S. 82; *see also* Roos, *Stateless Vessels and the High Seas Narcotics Trade: United States Courts Deviate from International Principles of Jurisdiction*, 9 MAR. LAW. 273, 278-79 (1984).

Shipping registers are the administrative mechanism through which a vessel obtains its nationality. Tache, *The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link*, 16 INT. LAW. 301, 302 (1982). When a vessel is registered, the state of registration extends its nationality to the ship. Convention on the High Seas, *supra*, at art. 5. The registration process includes the transfer of documents that serve as proof of nationality and the right to fly the state's flag. Note, *Promulgation and Enforcement of Minimum Standards for Foreign Flag Ships*, 6 BROOKLYN J. INT'L L. 54, 55 (1980) [hereinafter Note, *Minimum Standards*].

The flag is flown by a vessel as a symbol of the sovereign to whom it owes allegiance and as a warning to others of that sovereign's protection. Roos, *supra*, at 278. Freedom to navigate the high seas is granted to ships from all nations, provided that they are flying the flag of a recognized sovereign nation. *See id.* at 280-81.

¹³ New Developments, *supra* note 11, at ¶ 95,174.

¹⁴ Communication, *supra* note 1, at III(2)(54). The proposal sets specific guidelines for member state aid to national fleets. *Id.* at V(67).

¹⁵ *Id.* at VI(1)(93)-VI(9)(148). Measures intended to prepare Community vessels for international competition involve tax and social security benefits, research and development, conditions for transferring ships between member states, promoting the shipping of food aid under the EC flag, and technical standards and methods of control in Community ports. *Id.*

II. BACKGROUND: THE CRISIS FACING THE COMMUNITY FLEET

The Commission is alarmed by the decline of the Community fleet over the past decade.¹⁶ Between 1980 and 1988 the tonnage of the Community fleet was practically cut in half, from 117 million gross tons to fifty-nine million gross tons.¹⁷ Member states' share of the world fleet fell from 29.7 percent in 1980 to 15.4 percent in 1988.¹⁸ Consequently, the number of jobs in the Community shipping industry dropped by 45 percent between 1980 and 1986.¹⁹ In addition there have been significant job losses in related industries such as ship building and ship repair.²⁰

The phenomenon of open registers and offshore registers²¹ are the primary reasons for the Community fleet's decline.²² Eu-

¹⁶ See Communication, *supra* note 1, at I(1).

¹⁷ Communication, *supra* note 1, at I(1), II(1)(b)(18); see also Journal of Commerce and Commercial, May 25, 1989, at B3.

¹⁸ Communication, *supra* note 1, at I(1); see also Journal of Commerce and Commercial, May 25, 1989, at B3.

¹⁹ Communication, *supra* note 1, at II(1)(d)(28); see also Journal of Commerce and Commercial, June 1, 1989, at B1; Journal of Commerce and Commercial, May 25, 1989, at B3.

²⁰ Communication, *supra* note 1, at II(1)(d)(29).

²¹ There are three systems to register ships: closed, open, and offshore registers. Tache, *supra* note 12, at 301–04. Open registers, commonly referred to as flags of convenience, are those which permit registration of ships regardless of ownership, manning, or control. *Id.* at 304.

Open registers are desired by shipowners because of the substantial economic advantages that they provide, such as lower taxes; higher profits due to lower wage and benefit scales; foreign exchange flows; arbitrary hiring and firing of crews; and lower maintenance, repair, and safety standards for ships. Note, *Minimum Standards*, *supra* note 12, at 55.

In a closed register system, the state will bestow nationality only to ships that are wholly owned by its citizens and manned primarily with a national crew. Tache, *supra* note 12, at 303. States with open registers will confer nationality upon ships regardless of ownership, control, or manning. *Id.* at 304. Offshore registers set conditions on the granting of nationality to a ship, but these conditions are less strict than the closed register system. *Id.* at 303–04.

Article 5(1) of the Convention on the High Seas provides that “[e]ach State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag” Convention on the High Seas, *supra* note 12, at art. 5. In other words, under international law, every state has the right to establish whatever type of register system it deems appropriate. Tache, *supra* note 12, at 303.

²² See Communication, *supra* note 1, at II(1)(b)(19). In addition to the problem of European shipping operations registering their vessels under open registers and offshore registers, the Commission points to several other reasons for the decline in the Community fleet. *Id.* at II(1)(9). The Commission states that the protracted oversupply of shipping services worldwide caused a fall in freight rates. *Id.* The Commission also attributes the Community fleet's decline to the reduced demand for world shipping services due to the

ropean shipowners have opted to register their vessels under open registers and offshore registers rather than under the mainland closed registers.²³ Both offshore registers and open registers offer shipowners low cost registration for their vessels and little or no taxation.²⁴ In addition, the alternative registers subject the shipowner to less stringent registration requirements than closed registers.²⁵

A. *Open Registers*

During the post-1981 Community fleet decline, fleets registered under open registers grew from 27 percent to 35 percent.²⁶ These open register nations²⁷ have been luring European shipowners to register under their flags in exchange for greatly reduced operating costs.²⁸ Shipowners register their vessels under open registers in order to compete in the international marketplace.²⁹

Studies have concluded that open registers have adversely affected international shipping.³⁰ These studies conclude that standards of responsibility and accountability are more likely to be breached under open registers than under other flags.³¹ Breach of such standards stems from the flag state's lack of control over owners, managers, and key shipboard personnel.³² Since open registers do not provide an economic link between the flag state and the vessel, the shipowners often create dangerous conditions for the environment, force crews to work under oppressive conditions, and undermine systems which impose higher safety stan-

overall decline in the level of economic activity and its impact on seaborne trade. *Id.* at II(1)(9), II(1)(a)(12).

²³ Communication, *supra* note 1, at I(1).

²⁴ See Communication, *supra* note 1, at II(3)(40).

²⁵ *Id.*

²⁶ Communication, *supra* note 1, at II(1)(b)(17)–(24).

²⁷ The primary open register nations are Panama, Honduras, and Liberia. Additionally, Cyprus, Costa Rica, the Bahamas, Oman, Singapore, and Somalia are popular flags of convenience. Tache, *supra* note 12, at 304 n.26.

²⁸ Communication, *supra* note 1, at II(2)(31)–(33).

²⁹ See Journal of Commerce and Commercial, Sept. 2, 1987, at B1.

³⁰ McConnell, "Business as Usual": An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships, 18 JOURNAL OF MARITIME LAW AND COMMERCE 435, 438 (1987); see also Note, Minimum Standards, *supra* note 12, at 56.

³¹ McConnell, *supra* note 30, at 438.

³² *Id.*

dards.³³ Therefore, the Commission has determined that there is a need to remove the open registers' competitive advantage.³⁴

B. *Offshore Registers*

In addition to the competition from open registers, the Commission attributes the further decline of the Community fleet to the growth of offshore registers.³⁵ Member states have developed offshore registers in order to help their fleets compete with the vessels flagged under open registers.³⁶ The most attractive feature of offshore registers for European shipowners is the possibility of employing non-Community sailors³⁷ on non-Community conditions and wages.³⁸ Non-Community crews receive lower wages and benefits than Community nationals. This translates into lower operating costs for shipowners.³⁹ In this manner, offshore registers help European shipowners compete with open registers while retaining the protection of the member state.⁴⁰

³³ Note, *Minimum Standards*, *supra* note 12, at 56–57.

³⁴ Communication, *supra* note 1, at I(1)–(8).

³⁵ Communication, *supra* note 1, at II(3)(40); *Journal of Commerce and Commercial*, May 25, 1989, at B3.

³⁶ Communication, *supra* note 1, at II(3)(39),(40). Crew costs are much lower for shipowners who register under flags of convenience because basic wages are lower, and also because social security and tax contributions are lower or nonexistent. Communication, *supra* note 1, at II(3)(40). In addition, shipping companies established in some open register countries do not have to pay any tax. *Id.*

³⁷ Communication, *supra* note 1, at II(2)(34) n.2, II(3)(40); *Journal of Commerce and Commercial*, Sept. 2, 1987, at B1. Traditionally, these non-Community sailors come from lesser developed countries (LDC's), particularly from the Far East, but COMECON countries are now becoming an important supplier of sailors. Communication, *supra* note 1, at II(3)(40).

Manning costs tend to be the most important variable costs for ship owners; other expenses such as repairs, storage, insurance, and finance are universally available at about the same cost. *Journal of Commerce and Commercial*, Sept. 2, 1987, at B1. Operating a ship under some established registers can cost over 50 percent more than under certain open registers. *Id.* For example, it would cost approximately \$1.286 million a year to operate a Dutch container ship capable of carrying the equivalent of 1500 twenty-foot containers under a Dutch flag with a national crew. *Id.* These costs fall to \$338,000 with a Polish crew and \$300,000 with a Filipino, South Korean, or Chinese crew under an open register. *Id.*

A study undertaken for the Commission suggested that running costs of a German registered vessel could be reduced by an average of 30% by flagging out, of which 90% was represented by savings on crew costs. Communication, *supra* note 1, at II(2)(34) n.2.

³⁸ Communication, *supra* note 1, at II(3)(40).

³⁹ *Id.*

⁴⁰ *Id.*

Since 1980, the majority of European shipowners seeking alternative registers did not opt for traditional flags of convenience like Liberia, Panama, or Honduras. Instead, these shipowners registered their vessels under offshore European registers.⁴¹ The Norwegian International Registry attracted 241 ships of 12.2 million tons deadweight within one year of its establishment.⁴² The Isle of Man, one of the United Kingdom's offshore registers, attracted 112 ships of 2.3 million gross tons.⁴³ In fact, the Isle of Man registered more tanker tonnage than the United Kingdom's total commercial fleet.⁴⁴ The French have established an offshore register in the Kerguelen Islands, a French possession in the Antarctic.⁴⁵ Portugal is close to announcing plans for an offshore register in Madeira.⁴⁶ In addition, the bulk of the Danish fleet has been transferred to an offshore base, and even land-locked Luxembourg is planning to establish its own international register.⁴⁷

The Commission has determined that offshore registers are undesirable.⁴⁸ These offshore registers tend to increase disparities between member states and distort competition between them.⁴⁹ The existence of offshore registers hinders the Community's goal of free movement of capital, labor, goods, and services between member states.⁵⁰ The Commission is not willing to allow the Community's presence in the world shipping industry to fade away as the national maritime policies of the member states drift apart.⁵¹

III. THE ADVANTAGES OF A COMMON MARITIME TRANSPORT POLICY

The common maritime transport policy is one of the Community's least known policies because shipping has long been

⁴¹ Journal of Commerce and Commercial, May 25, 1989, at B3.

⁴² Communication, *supra* note 1, at II(1)(b)(25).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Journal of Commerce and Commercial, May 25, 1989, at B3.

⁴⁶ Journal of Commerce and Commercial, May 15, 1989, at B16.

⁴⁷ Communication, *supra* note 1, at II(1)(b)(25); Journal of Commerce and Commercial, May 15, 1986, at B16.

⁴⁸ Communication, *supra* note 1, at III(2)(48)-(49).

⁴⁹ Communication, *supra* note 1, at II(3)(49).

⁵⁰ *Id.*; see EEC Treaty, *supra* note 1, at art. 8.

⁵¹ *Id.*

considered an area of purely national interest.⁵² Member states have traditionally advocated individual national control of shipping policies.⁵³ Recent developments have changed this posture.⁵⁴

Maritime transport policy was of little importance to the original Community of six continental states.⁵⁵ Now, however, with the accession of several traditional maritime nations to the Community, including the United Kingdom, Greece, Spain, and Portugal, there is a significant need for a common maritime transport policy.⁵⁶ Such a policy would harmonize the member states' national shipping register systems and reduce a source of divisiveness in the Community.⁵⁷

In its Communication, the Commission identifies three economic and commercial reasons for pursuing a common maritime transport policy.⁵⁸ The Commission suggests that a common maritime transport policy is necessary because the Community fleet has high strategic value. The Commission believes that the Community should develop its own fleet to avoid depending on third country fleets. The Commission suggests that Europeans should at least have the option of choosing a competitive Community fleet, controlled by Community interests and flying a Community flag, to transport their imports and exports. The Commission contends that the loss of the Community fleet would adversely affect the quality and cost of transport to and from the Community and damage its trading position. In addition, the Commission posits that member state fleets directly contribute to the balance of payments through their domestic and foreign operation.

The Commission suggests that a common maritime transport policy would protect employment generated by the Community fleet.⁵⁹ It states that there is a strategic need to maintain a force of well trained and experienced sailors. In addition, the Com-

⁵² Bredimas, *supra* note 2, at 9.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See PLENDER AND USHER, CASES AND MATERIALS ON THE LAW OF THE EUROPEAN COMMUNITIES 1, (2nd ed., 1989). The original six are Belgium, The Netherlands, Luxembourg, France, West Germany, and Italy. *Id.*

⁵⁶ Bredimas, *supra* note 2, at 10.

⁵⁷ Communication, *supra* note 1, at III(2)(48)-(52).

⁵⁸ Communication, *supra* note 1, at III(1)(42).

⁵⁹ See Communication, *supra* note 1, at III(1)(44); see also Journal of Commerce and Commercial, May 25, 1989, at B3.

mission is concerned with employment in related services and industries. The Commission wants to develop the Community fleet in order to protect employment in industries such as ship-building and ship repairs.

The Commission contends that a common maritime transport policy would help protect member states' national security concerns.⁶⁰ Member states may have defense policies which depend on the availability of Community vessels and experienced Community sailors for logistical and tactical support.

Finally, a common maritime transport policy would codify existing case law on maritime transport in the EEC and eliminate the confusion as to which provisions of the EEC Treaty already apply to maritime transport.⁶¹ In the *French Seamen Case*, the European Court of Justice (European Court) established the principle that the fundamental general rules of the Community apply to shipping.⁶² This holding has important legal and political implications because it incorporated shipping in the process of European integration.⁶³ It is not clear, however, that *all* of the general rules of the EEC Treaty automatically apply to maritime transport.⁶⁴ Therefore, the common maritime transport policy would serve to clarify member state obligations under the EEC Treaty in the area of maritime transport.

IV. THE STRUCTURE OF THE PROPOSED ACTION PROGRAMME

The Communication details a three-tiered action programme which would establish the foundation for a common maritime transport policy.⁶⁵ First, the Commission suggests establishing a

⁶⁰ Communication, *supra* note 1, at III(1)(47).

⁶¹ See generally Bredimas, *supra* note 2.

⁶² Commission v. French Republic, Common Mkt. Rep. (CCH) ¶ 8270 (1974) [hereinafter *French Seamen Case*]. In the *French Seamen Case*, the European Court of Justice (European Court) invalidated a French law requiring a certain percentage of crewmembers aboard French vessels to be French nationals because it violated the EEC Treaty. *Id.* at 9191-9. Specifically, the French law violated article 48 of the EEC Treaty because it infringed on the principle of free movement of workers. *Id.* The European Court held that article 48 is directly applicable in the internal legislation of a member state and *ipso facto* creates rights for individuals that the national courts must protect. *Id.* at 9191-9, 10.

⁶³ Bredimas, *supra* note 2, at 10.

⁶⁴ *Id.* at 17. Some of the fundamental rules of the EEC Treaty that may apply to maritime transport include free movement of goods, persons, services, and capital; rules on free competition and taxation; economic policy; and provisions on the Community institutions. *Id.*

⁶⁵ Communication, *supra* note 1, at III(2)(54).

parallel Community register under which qualified vessels would fly the EC flag. Second, the Commission proposes harmonizing member state assistance to the Community fleet. Third, the Commission proposes policies designed to reduce the operating costs of Community vessels and to act as incentives for European ship-owners to register under the EC flag.

A. *Community Ship Register*

The idea of establishing a flag for the European Communities to deal with the collapse of the Community fleet was first proposed over two years ago.⁶⁶ Originally, the Commission investigated the possibility of establishing a single Community register.⁶⁷ Due to the overwhelming practical difficulties involved in transferring the member states' fleets to a single Community register, the Commission decided to propose a parallel register for the Community fleet.⁶⁸ Under the parallel register system, ships would remain registered and under the control and jurisdiction of a member state, but they would also be eligible for registration in the Community register.⁶⁹ Eligibility for the parallel Community register would be conditioned on certain measures that are designed to contribute to the maintenance of a Community fleet and to the creation of a workforce of high quality Community sailors. A vessel which meets these safety and social conditions would be granted the right to fly the EC flag and would enjoy certain benefits ancillary to that right.⁷⁰

In order to be registered under the EC flag, the vessel must be owned by a member state national.⁷¹ All of the officers aboard the vessel and one-half of the crew must also be nationals of a member state.⁷² Where the member state register permits a lower

⁶⁶ Journal of Commerce and Commercial, May 25, 1989, at B3.

⁶⁷ *Id.*

⁶⁸ Communication, *supra* note 1, at IV(55); Journal of Commerce and Commercial, May 25, 1989, at B3.

⁶⁹ Communication, *supra* note 1, at IV(55).

⁷⁰ Information Memorandum, P-28, May 31, 1989, at 2-3.

⁷¹ *Id.* at 2.

⁷² Communication, *supra* note 1, at IV(60); Information Memorandum, No. P-28, *supra* note 70, at 2. The Communication's crew nationality requirement would probably lead to the employment of sailors from low cost member states. Address by Dr. Wolfgang Hubner, Instituto Vasco de Administracion Publica (Nov. 2, 1989). This trend could serve to make Community shipping more competitive, however, it probably will not be enough to lessen the open registers' comparative advantage. *Id.*

proportion of member state nationals, its ships would only be admitted to the Community register if they complied with or exceeded the Community's requirements.⁷³ Although the Community ship register requires a substantial number of member state nationals to man EC flagged ships, the shipowners are not banned from employing third country nationals, provided that internationally agreed standards for wages and working conditions are met.⁷⁴ The crew nationality requirements are designed to protect the employment of European sailors in highly skilled functions, which is one of the Commission's goals.⁷⁵

The technical and legal structure of the Community register is fairly simple. It is consistent with international law since it does not lead to registration of a ship in two different states.⁷⁶ The ship remains on its national register, and the legislation of the member state governs the control and jurisdiction over the vessel.⁷⁷ Entry on the Community register would be fairly easy, with no need for transfer of ownership; resurvey; remeasurement; or renegotiation of leases, loan agreements, or mortgages.⁷⁸ The proposed action programme provides for the removal of technical hindrances to transferring vessels registered on the Community register between member states.⁷⁹ In addition, member states would recognize the qualifications of sailors from other member states, subject to internationally recognized minimum standards.⁸⁰ Sailors having the nationality of a member state would be free to work on every vessel registered in EUROS.⁸¹

B. *Harmonization of State Aid*

In an attempt to harmonize state aid to national fleets, the Commission has defined the conditions under which a member

⁷³ Communication, *supra* note 1, at IV(60).

⁷⁴ *Id.* at IV(61). Such standards include International Labor Organization (ILO) Wages, Hours of Work, and Manning (Sea) Recommendations (No. 109). In addition, Social Security benefits for the sailors must be provided at a level that reflects the state of the country where the sailor is a resident (ILO Social Security for Seafarers (Revised) Convention, (No. 165)). *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at IV(65); *see also* Address by Dr. Wolfgang Hubner, *supra* note 72.

⁷⁷ Communication, *supra* note 1, at IV(65).

⁷⁸ *Id.*

⁷⁹ *Id.* at IV(62), Annex 1, art. 12.

⁸⁰ *Id.* at IV(62), Annex 1, art. 13.

⁸¹ *Id.*

state's aid to shipping companies would be considered compatible with the internal market.⁸² The idea is to increase the efficiency of action already undertaken on a national level by providing a general framework for the aid.⁸³ The framework will include measures addressing the following: company taxation, tax treatment of sailors, contributions to social security, repatriation costs, and training costs.⁸⁴

State aids designed to improve the competitive position of the fleet would be deemed compatible with the EEC if the following three conditions are met. The first condition for state aid is that it "must not be out of proportion to [its] aim"⁸⁵ In other words, the intensity of the aid granted must be in proportion to the intensity of the problem it intends to solve. The Commission acknowledges that this intensity will reflect cost differences in the member states.⁸⁶ Second, state aid must be temporary and preferably on a declining scale.⁸⁷ Finally, aid must not specifically contribute to increasing or maintaining capacity in areas that are already saturated with competitors.⁸⁸

C. *Attracting European Shipowners to EUROS*

The Commission recognizes that manning costs are the main component of the Community fleet's competitive disadvantage in the world marketplace.⁸⁹ Therefore, the Commission proposes that Community sponsored research be undertaken to improve the technical efficiency of the fleet.⁹⁰ Such research⁹¹ would be designed to improve fuel efficiency and reduce maintenance and manning costs.⁹²

⁸² *Id.* at V(67).

⁸³ *Id.* This framework has been criticized as perpetuating the high level of subsidies granted to the shipping industry instead of curtailing such aid. Address of Dr. Wolfgang Hubner, *supra* note 72.

⁸⁴ *Id.* at V(67),(92); *see also* Information Memorandum, *supra* note 70, at 1.

⁸⁵ Communication, *supra* note 1, at V(2)(89)(a)–(c); Annex 2, II(b).

⁸⁶ *Id.* at Annex 2, II(b).

⁸⁷ *Id.*

⁸⁸ *Id.* at 89(a)–(c); Annex 2, II(c).

⁸⁹ *Id.* at V(1)(93).

⁹⁰ *Id.* at V(1)(94).

⁹¹ *Id.* The research would focus on developing specialized techniques and high quality services. The purpose of the research and development policy is to increase efficiency but, at the same time, to improve work and safety conditions and protect the environment. *Id.* at VI(1)(104).

⁹² *Id.* at V(1)(94).

The Commission has proposed a measure to remove member states' restrictions on cabotage.⁹³ Such a measure would be a step towards removing restrictions on the freedom to provide services in member states' territorial waters.⁹⁴ It is also a significant incentive to attract European shipowners because cabotage represents a substantial amount of business.⁹⁵ The Commission suggests that the removal of cabotage restrictions is necessary in order to work towards establishing the internal market.⁹⁶

Another measure under consideration by the Commission is mutual recognition of the technical equipment of ships.⁹⁷ Such recognition is part of the larger plan to facilitate the transfer of EC flagged ships between the national registers of other member states.⁹⁸ The Commission believes that if a ship is registered under EUROS, it should be free to transfer between Community shipowners and member state flags.⁹⁹

As part of the plan to reduce differences in working conditions in the Community fleet, the Commission has also focused its attention on social measures.¹⁰⁰ Specifically, the Commission has proposed developing measures that would improve working conditions in the shipping industry; create common training and retraining programs for the sailors; and recognize the diplomas, licenses, and certificates of competence issued by the member states.¹⁰¹ These social measures would include a specific provision that would allow sailors from any member state to be free to work on any vessels registered under an EC flag.¹⁰² Actions would also

⁹³ *Id.* at VI(7)(141). Cabotage services are services from one port to another in the same member state via that member's territorial waters. New Developments, *supra* note 11, at ¶ 95,174.

⁹⁴ Communication, *supra* note 1, at VI(7)(141). In this regard, the Commission contends that the EEC Treaty requires removal of obstacles to the free movement of services. *Id.* at VI(7)(139)–(140).

⁹⁵ See Information Memorandum, *supra* note 70. Since a large number of member states do not have regulations regarding cabotage services, the removal of restrictions on cabotage services for European shipowners may lead to increased protectionism and run counter to the goals of the EEC Treaty. Address of Dr. Wolfgang Hubner, *supra* note 72. The declared shipping policy of the EEC is antiprotectionist and favors increased liberalization of shipping services. *Id.*

⁹⁶ Communication, *supra* note 1, at Annex 5.

⁹⁷ *Id.* at VI(2)(108).

⁹⁸ *Id.* at VI(2)(115).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at VI(3)(117)–(122).

¹⁰¹ *Id.* at VI(3)(118).

¹⁰² *Id.* at VI(3)(122).

be taken to strengthen the enforcement of port state control in order to protect the marine environment and protect against pollution.¹⁰³ In addition, the proposed action programme calls for the use of the Community flagged ships to transport food aid.¹⁰⁴ This provision would give shipowners registered under the EC flag an opportunity to offer their services for the transport of Community food aid cargoes.¹⁰⁵

V. ANALYSIS

A. *Will the Proposed Action Programme Solve the Shipping Crisis?*

It is not clear that establishing a Community register parallel to the member states' registers is going to narrow the gap between high cost member state shipping operations and low cost flags of convenience.¹⁰⁶ The main reason that the open register nations are able to attract such a large percentage of the world merchant shipping fleet is that there are no real crew regulations.¹⁰⁷ In other words, shipowners can substantially lower their operating costs by registering under flags of convenience and paying very low wages to the crews, thereby increasing their competitive advantage in the world marketplace.¹⁰⁸

The proposed action programme includes several significant social welfare provisions which will force Community vessels' operating costs to remain higher than those vessels registered under flags of convenience. The proposed action programme does not allow Community shipowners to pay the same low wages that open register nations permit.¹⁰⁹ The proposed action programme calls for EC flagged vessels to hire a certain percentage of member state nationals and pay these crewmen wages and benefits that are standard in the Community.¹¹⁰ Although the proposed action programme allows the hiring of nonmember state nationals, even these sailors are entitled to internationally agreed standards for wages and benefits.¹¹¹ Any such program that has these social

¹⁰³ *Id.* at VI(4)(124).

¹⁰⁴ *Id.* at VI(5)(131).

¹⁰⁵ *Id.* at VI(5)(133).

¹⁰⁶ *Journal of Commerce and Commercial*, June 1, 1989, at B1.

¹⁰⁷ *See supra* text accompanying note 21.

¹⁰⁸ *Id.*

¹⁰⁹ *See supra* text accompanying note 74.

¹¹⁰ *See supra* text accompanying notes 71-72.

¹¹¹ *See supra* text accompanying note 74.

welfare provisions probably cannot compete with the flags of convenience.

It is possible that the whole concept of national shipping flags is out of date and that global registration under the United Nations International Maritime Organization (IMO) might be more appropriate than a Community register.¹¹² Some industry representatives have argued that with so many EEC countries having already established offshore registers, the creation of yet another register is not the answer.¹¹³ They suggest that the real solution is to establish minimum international standards for crews and vessels that will be enforced.¹¹⁴

The best solution would probably be to establish a worldwide register under the IMO where minimum standards would vitiate the open registers' competitive advantage and increase the safety and well-being of the world merchant fleet and crew. Such a convention, however, is not going to materialize in the near future, and the Community fleet is in dire need of attention.¹¹⁵

Considering the need for immediate action, the Commission's proposed action programme may be worthwhile. It probably will not deter most shipowners from flagging in open registers, but since the majority of the European shipowners have shown a marked preference for offshore registers over the past few years,¹¹⁶ the Community register might be able to attract a significant number of these vessels. These shipowners may feel that the protection granted under the EC flag is much greater than the protection under flags of convenience.¹¹⁷ In addition, the granting of cabotage privileges to EC flagged vessels may be enough of an incentive for some shipowners to register under the EC flag since cabotage represents a substantial amount of shipping business.¹¹⁸

B. *Will the Proposed Action Programme Help Complete the Internal Market?*

The proposed action programme's second goal of contributing to the completion of the internal market would probably be

¹¹² Journal of Commerce and Commercial, Nov. 6, 1986, at B1.

¹¹³ Journal of Commerce and Commercial, May 15, 1989, at B16.

¹¹⁴ See McConnell, *supra* note 30, at 438.

¹¹⁵ See *supra* text accompanying notes 16–51.

¹¹⁶ See *supra* text accompanying notes 17–47.

¹¹⁷ Journal of Commerce and Commercial, Nov. 6, 1986, at B1.

¹¹⁸ New Developments, *supra* note 11, at ¶ 19,174.

achieved if the proposed action programme were implemented. The proposed action programme is consistent with the Community's goal of free movement of capital, labor, goods, and services between member states.¹¹⁹ With a parallel register system, vessels could easily and safely be transferred between member states and Community shipowners.¹²⁰ In addition, member state nationals who meet the necessary qualifications would be free to transfer to any EC flagged vessel.¹²¹ Harmonization of state aid would reduce disparity among member state maritime transport policies and remove this source of divisiveness. Finally, the provisions designed to improve efficiency of the Community fleet through research and development and establishment of high social standards will help ensure protection of the environment and reduce long-term costs.

VI. CONCLUSION

The crisis facing the Community fleet is not one of recent origin since the fleet has been steadily declining for the past decade. The proposed action programme to establish a common maritime transport policy is long overdue. In fact, the phenomenon of flags of convenience has probably caused irreparable damage to the Community fleet.

Since there is no way to beat the open register system, short of joining it, the proposed action programme probably will not eliminate the open registers' competitive advantage in world shipping. The proposed action programme, however, should be able to eliminate the need for European offshore registers because it offers significant incentives to attract European shipowners. Since these shipowners have already demonstrated a preference for offshore registers over flags of convenience, these incentives should be sufficient to lure some European shipowners to EU-ROS.

The proposed action programme is a responsible and well planned approach towards completing the internal market. It

¹¹⁹ See Communication, *supra* note 1, at III(2)(49), IV(55)–(66).

¹²⁰ *Id.* at VI(2)(115).

¹²¹ *Id.* at VI(3)(122).

sets realistic goals and has a well planned agenda. The proposed action programme places a high priority on social welfare for sailors and, if adopted, would probably successfully protect employment of Community nationals in shipping and related industries.

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